

UNITED STATES
v.
NORMAN ROGERS

A-31049

Decided MAR 3 1970

Mining Claims: Common Varieties of Minerals: Unique Property --
Mining Claims: Common Varieties of Minerals: Special Value

To determine whether a deposit of stone is a common variety of stone, there must be a comparison of the material found in that deposit with other similar-type minerals in order to ascertain whether the material has a property giving it a distinct and special value; where no basis is shown for distinguishing the material in the deposit from that found in other deposits of commonly-occurring stone except that some material from the first deposit has been marketed while none has been marketed from the other deposits, and where comparison with other materials which are used for the same purposes for which the material is allegedly valuable is not possible because those purposes are not adequately explained and other materials used for the same purposes are not identified, it is properly determined that the material in the particular deposit is a common variety of stone not subject to location under the mining laws of the United States after July 23, 1955.



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-31049

United States

v.

Norman Rogers

: Contest No. 1764 (Montana)

: Mining claim

: declared null and void

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Norman Rogers has appealed to the Secretary of the Interior from a decision dated August 8, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, modified and affirmed a decision of a hearing examiner declaring the Granite No. 1 mining claim in sec. 9, T. 2 N., R. 5 W., M.P.M., Jefferson County, Montana, to be null and void. 1/

The record shows that the Granite No. 1 lode mining claim was located by appellant on August 26, 1961. 2/ On July 1, 1964, the Government, acting through the Bureau of Land Management, filed a contest complaint in the Montana land office in which it was charged that:

1/ Norman Rogers and American Chemet Corporation were named as contestees in the contest complaint filed in the Montana land office. American Chemet Corporation did not file an answer to the complaint, and there is neither evidence in the record that it had an interest in the mining claim nor an explanation as to why it was named as a contestee. It therefore is not designated here as a party to the proceeding.

2/ Although the certificate of location described the claim as a lode mining claim, the claim which is the object of these proceedings was described in the contest complaint, as well as in the hearing examiner's decision, as the Granite No. 1 placer mining claim. This inconsistency will be given further attention hereafter.

"(1) The material found within the limits of the claim is not a valuable mineral deposit under Section 3 of the Act of July 23, 1955. (69 Stat. 367, 30 U.S.C. § 601). 3/

(2) Valuable minerals have not been found within the limits of the claim so as to constitute a valuable discovery within the meaning of the mining laws."

The complaint also stated that notice of application for withdrawal, Montana 065304, covering the NW $\frac{1}{4}$ sec. 9, T. 2 N., R. 5 W., was published in the Federal Register on May 7, 1964, the purpose of the proposed withdrawal being the use of the land as a recreation area and the protection of the unique formation of rocks in the area.

At a hearing held at Helena, Montana, on July 29, 1965, Robert G. Newman, a mining engineer employed by the Bureau of Land Management, testified on behalf of the contestant that he had examined the claim three times in 1963 as well as on other occasions (I Tr. 7). 4/ There was some question in his mind, Newman stated, as to whether the claim was lode or placer. The claim was located with the dimensions of a lode, he said, and was recorded as a lode claim in the books in the county court house. However, to the best of his recollection, the notice on the ground indicated that it was a placer claim (I Tr. 8).

The claim, according to Newman, embraces the most conspicuous part of a rock formation described as "a basic Gabbro intrusion known as 'Ringing Rocks'", which consists of "a dark-grey sub-black crystalline [sic], igneous rock of fairly basic composition." Newman stated that he took several "grab samples" of material from

3/ Although the complaint properly referred to section 3 of the act of July 23, 1955, it erroneously gave the code citation as "30 U.S.C. § 601". The provisions of section 3 of the act of July 23, 1955, are found in 30 U.S.C. § 611 (1964).

4/ The transcript of the hearing appears in two volumes without consecutive pagination, the first containing the proceedings of Thursday morning, July 29, 1965, and the second containing the proceedings of the afternoon of the same day. For convenience they are referred to herein as I Tr. and II Tr., respectively.

the claim which, because of the relatively homogeneous nature of the deposit, "should be considered to be representative of the whole area". Petrographic examination of the material under a polarized microscope, he testified, indicated that the material is composed of about 20 percent biotite and magnetite, 25 percent chlorite and pyroxene and 55 percent feldspar, and, in the building stone industry, it would probably be described as "a black granite". (I Tr. 10-16.)

Newman testified, upon the basis of inquiry made of potential purchasers, that there is no market for the material from the claim in a natural polished state but that it could be used in a crushed form for roofing chips and tar roofs, for aggregate in driveways, for fill material and for terrazzo floors and that it could also be cast into panels and used for either exterior or interior wall surfacing in a polished state or in an exposed state (I Tr. 25-29). He stated that there are several other deposits of similar gabbro, or diorite-gabbro, material in the State of Montana, three of which he sampled (I Tr. 17-20). The samples from those deposits were, in his opinion, almost indistinguishable in physical appearance from the material taken from appellant's claim (I Tr. 21).

Newman stated that he observed no mineralized zones within the claim (I Tr. 11), that the rock itself would have no value for the extraction of any of its constituent minerals (I Tr. 17), and that, in his opinion, there is not a valuable mineral exposed within the Granite No. 1 claim (I Tr. 31). He was informed, he stated, that approximately 400 tons of material had been removed from the claim, and, although he did not measure the excavation, this seemed to him to be about the amount of material that had been removed (I Tr. 30).

Appellant testified in his own behalf that he has spent in excess of \$10,000 on the claim, that he has a market for the material taken from the claim and a prospect of a much bigger market in the future, and that he receives in excess of \$25 per ton for the material which he extracts at a cost of not more than \$8 per ton, including the cost of hauling the material to Sheridan, Montana, where it is processed for market (II Tr. 7-8). He stated that because of the weathering characteristics of the material on the claim there was very little market for it as a building stone and that it is therefore shipped to "these other markets, refineries,

and the sandblasters for some of these hardenings" (II Tr. 7, 13). Appellant indicated that he does not deliver material to the ultimate purchasers but that he sells it to American Chemet Corporation which, in turn, crushes the material to sizes ranging from sand to 5 or 6 inches and markets the crushed product (II Tr. 13-14). He did not know how much material was sold for refinery use or for sandblasting or why the material was used for those purposes (II Tr. 14-16). He also reported use of the material in making eight tombstones, only three of which had been sold, and he acknowledged that there was not a market for the material for that purpose (II Tr. 17-18).

Appellant indicated that, because of a ringing quality of some of the rocks when struck by another object, "there is a demand coming in for just the rock that will ring for bell purposes, because they give off several tones" (II Tr. 10). He said that he had sold about a half dozen rocks for that purpose but that the fact that the rock may ring had no significance except to those who might want it for bells. He said that selling the rock for bells was "just a sideline along with the other business" and not the primary purpose for locating the claim. (II Tr. 21-23.) Appellant also testified that he had attempted to sell material taken from the other deposits described by the Government's witness, Newman, but that there was no market for it, that he didn't know what the difference was between the gabbro on the Granite No. 1 claim and that found in other deposits, and that he was not interested in it (II Tr. 9, 21). He did not indicate for what purposes he had attempted to dispose of the material.

Hoyt Larison, president of American Chemet Corporation, testified on behalf of the mining claimant that his company had taken approximately 400 tons of material from appellant's claim at the time of the hearing and that, after crushing and bagging, the material was sold for \$32 per ton, f.o.b. Sheridan (II Tr. 27-28, 31, 37-39). Of the 400 tons of material purchased, approximately 150 tons remained at American Chemet's plant at Sheridan at the time of the hearing (II Tr. 32). Larison stated that about half of the first 200 tons sold by American Chemet was used as exposed aggregate in building but that, because of poor weathering effects, that use was gone and no effort was being made to sell any more for building purposes (II Tr. 33). The rest of the material sold, according to the witness, was crushed, and, of the 150 tons sold for purposes other than building, a part was sold, through Sturgis Sand and Material Company, to Phillips Petroleum Company for use at two of its refineries, while the remainder was sold for use in sandblasting and as a concrete hardener (II Tr. 30, 33, 37, 40-41).

After stating that he had no idea how much material was sold to Phillips Petroleum Company (II Tr. 35-36) or how much was used as an abrasive (II Tr. 40), Larison estimated that half of the 150 tons went to refinery purposes, a fourth to abrasives and the remaining fourth to cement (II Tr. 41). With respect to the particular purposes for which the material was used in connection with the foregoing uses, he stated:

"I have been reluctant to divulge this information and they have been reluctant to give us any information on the uses. We have been told by our agents that -- with reference to [Exhibit] C-F, Phillips Petroleum, that they have used this in two refineries and find that it is superior to what they have been using. I cannot tell you what they were using previously, I am not familiar with refinery processing.

"There are other letters that didn't come in, but I had information that Remington Arms and Westinghouse are using it for precision sandblasting of various parts that require precision sandblasting. The use of the material as a concrete hardener are used to which -- I don't understand myself -- I know they are substituting this material for some other material that they were using previously. I cannot tell you that because they would not give us the information, but as these Exhibits indicate, these people have tested this and intend to continue to use it."
(II Tr. 29-30.)

Larison believed that the qualities of the material that made it useful were its hardness and sharpness and its low silica content (II Tr. 38, 42), but he had no knowledge of superiority of the material over other materials which might be used for the same purposes except what customers had told him. 5/

5/ The most detailed information presented at the hearing with respect to the nature of the use made of material from appellant's claim was contained in letters to Sturgis Sand and Material Company from three of its customers.

James O. Halley of Lee's Summit Ready Mix Concrete and Material, Kansas City, Missouri, stated:

From the evidence developed at the hearing the hearing examiner concluded, in a decision dated May 11, 1966, that "the material on the claim is a common variety and not locatable subsequent to the Act of July 23, 1955, because it is being used for the same purpose as other less desirable stone which is widely and readily available," and he declared the claim to be invalid.

In appealing to the Director, Bureau of Land Management, from the determination of the hearing examiner, appellant contended that the hearing examiner's decision was "centered strictly around the use of materials for building, while the evidence at the Hearing showed that Contestee was receiving consideration of up to \$32.00 per ton for the use of materials by the Phillips 66 Refinery, through the American Chemet Corporation." (Emphasis in original.) He argued that he had "sustained the burden of proof that he had developed the mining claim properly, that he was withdrawing minerals and other substance and selling them on a competitive market for a valuable consideration."

Footnote 5 Continued --

"We use graded Black Gabbro in the precision sand blasting of our equipment. At this time we are very happy with the results received from the use of Black Gabbro." (Ex. C-E.)

V. C. Cavin, refinery manager for Phillips Petroleum Company in Kansas City, Kansas, stated:

"We intend to utilize the sharp edges and the low silica content of black gabbro to coalesce water in an Alkylation Unit hydrocarbon stream at the Kansas City Kansas Refinery of Phillips Petroleum Company." (Ex. C-F.)

C. L. Kirkpatrick of Davis Waterproofing Company, Kansas City, Missouri, certified that:

"The purpose of this letter is to advise that our customers and ourselves are very satisfied with the 'Black Gabbro' abrasive purchased from you during the past year.

"The results from the abrasive are so good that we anticipate a large increase in the volume [sic] used during the coming year. Not only is this material excellent for precision blasting but it can be utilized for other types of blasting as well." (Ex. C-G.)

The black gabbro described in each instance, according to Larison, could only have come from appellant's claim (II Tr. 26).

In affirming the hearing examiner's determination that appellant's claim is invalid, the Office of Appeals and Hearings observed that, although the contest complaint identified the claim as the Granite No. 1 placer mining claim, the evidence submitted at the hearing related to the claim identified as the Granite No. 1 lode mining claim. The testimony and evidence presented at the hearing, it further found, established the character of the mineral material on the claim as placer material, and the hearing examiner found that there was no discovery of placer minerals sufficient to validate the claim. A lode mining claim located on ground clearly more valuable as placer, the Office of Appeals and Hearings stated, is void. Inasmuch as the claim was located as a lode claim, it concluded, it was null and void for want of a discovery of a valuable lode mineral deposit within the limits of the claim, and it was therefore unnecessary to determine whether there was a discovery of a valuable placer deposit, since the discovery of placer materials will not support a lode location.

In appealing to the Secretary, appellant contends that the decision of the Office of Appeals and Hearings "runs squarely contrary" to the opinion of the Supreme Court of the United States in United States v. Coleman, 390 U.S. 599 (1968), and that "the marketability and prudent man test is the proper test to be used in a case like this." He further asserts that he is "at a complete loss to know how the Appeals Examiner could find this was a placier [sic] and not a lode claim," that no testimony supports that conclusion and that the "government's witness Newman described the ore body as a lode."

We are unable to find any support for appellant's contention that Newman described any "ore body as a lode". Newman indicated only, as we have already observed, that there was some question in his mind as to whether the claim was located as a lode or a placer claim.

It is undoubtedly true, as the Office of Appeals and Hearings has indicated, that the discovery of a mineral-bearing vein or lode will not support a placer location and the discovery of a placer deposit will not support a lode location. See Helen V. Wells et al., 54 I.D. 306, 309 (1933), and cases cited. However, in the absence of a finding that a valuable mineral deposit has been found within the limits of the Granite No. 1 claim, we do not find it necessary to determine whether the deposit is lode or placer or to determine whether the claim was located for lode material or for placer material. For reasons to be set forth hereafter, we do find that appellant has not demonstrated the discovery of a valuable mineral deposit.

Section 3 of the act of July 23, 1955, as amended, 30 U.S.C. § 611 (1964), as the hearing examiner explained in his decision, provides that no deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim located after July 23, 1955.

It would appear that appellant is under the impression that all that need be shown to establish the fact that the material found on the Granite No. 1 claim is not a common variety of stone is that it can be marketed at a profit. Such is not the case. While a showing of economic value is an indispensable element in demonstrating the validity of any mining claim, economic value, per se, is not determinative of what constitutes a common or uncommon variety of mineral. In other words, a determination that a particular deposit consists of a common variety of mineral does not necessarily connote the absence of economic value, and proof that the material found in a particular deposit can be mined and marketed at a profit does not, ipso facto, remove that material from the category of "common varieties". United States v. Chas. Pfizer & Co., Inc., 76 I.D. (A-31015, December 29, 1969), and cases cited. Before the question of the marketability of the material at issue here can assume any importance, then, it must be determined that the material found on the claim is locatable, *i. e.*, that it is an uncommon variety of stone. 6/

6/ Were we to find marketability to be the key issue in this case, we would be unable to conclude from the evidence of record that the material in question is marketable at a profit. The so-called "marketability test", long employed by this Department in determining whether or not deposits of minerals of widespread occurrence were "valuable mineral deposits" and recognized by the Supreme Court in United States v. Coleman, *supra*, as an inherent part of the long-accepted "prudent man" test of Castle v. Womble, 19 L.D. 455 (1894), requires a showing, as of the date that the determination of the validity of a mining claim is to be made, that material from that particular claim could be extracted, removed and marketed at a profit. A showing of a prospective market, that is, one yet to be developed in the future, is not sufficient. United States v. Everett Foster et al., 65 I.D. 1, 8 (1958), *aff'd in Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959). Nor does the sale of minor quantities of material at a profit, or the disposal of substantial quantities at no profit, demonstrate the existence of a market for the material on a particular mining claim which would induce a man of ordinary

In order to show that a deposit of stone is not a common variety of stone, the Department has held that a mining claimant must establish (1) that the deposit has a unique property and (2) that the unique property gives it a distinct and special value. In applying these criteria there must be a comparison of the

Footnote 6 continued --

prudence to expend his means in an attempt to develop a valuable mine on that claim. See United States v. E. A. and Esther Barrows, 76 I.D. 299 (1969), and cases cited. Although the evidence of a market for the material in question here is rather inconclusive, the evidence submitted on behalf of appellant falls far short of making the required showing.

Appellant's witness, Larison, stated at the hearing that "if this is used to which Phillips Petroleum has put it [sic], and this would go to the oil refinery industry, in general, their use could be thousands of tons a month" (II Tr. 30-31). Larison's statement, of course, must be accepted for what it was plainly declared to be, "a wild estimate" of "the potential market in the future" (II Tr. 30), and it affords no basis for measuring the existing market. As to the present market, the only evidence offered was the reported removal and sale of 400 tons of material. Of those 400 tons, 150 tons remained, at the time of the hearing, stockpiled at the crushing plant of American Chemet Corporation, and 100 tons had been sold for uses for which, according to appellant's admission, a market no longer exists. Thus, only 150 tons, apparently, had been sold at the time of the hearing to those consumers who make up the existing, as well as the potential, market for the material.

Appellant, as we have previously observed, stated that he receives "in excess of \$25.00 a ton" for the material which he sells, that his costs "wouldn't exceed eight dollars a ton", and that the difference would be profit. He did not explain the basis for his computation of operating costs, and, in view of his alleged expenditures in "excess of \$10,000", an amount equivalent to the gross receipts for the sale of 400 tons of material at a price "in excess of \$25.00 at ton", it would appear that profit from the operation has been nominal.

deposit under consideration with other deposits of similar materials, and it must be shown that the material under consideration has some property which gives it value for purposes for which the other materials are not suited or, if the material is to be used for the same purposes as other minerals of common occurrence, that it possesses some property which gives it a special value for such uses, which value is reflected by the fact that it commands a higher price in the market place. Differences in chemical composition or physical properties are immaterial if they do not result in a distinct economic advantage of one material over another. See United States v. U. S. Minerals Development Corporation, 75 I.D. 127 (1968); United States v. Gene DeZan et al., A-30636 (July 24, 1968).

The essence of appellant's argument appears to be that:

(1) There is a market for material from the Granite No. 1 claim;

(2) There is no market for similar material occurring in other deposits described by the Government's witness:

(3) The marketability of the material from the Granite No. 1 claim must be attributed to some distinctive property it possesses which gives it a special value which other gabbro deposits do not possess.

The comparison is incomplete. As we have already pointed out, the demonstration of the marketability of the stone occurring in a particular deposit does not establish the fact that the material is an uncommon variety of stone. Nor is the fact established, although it may be suggested, by a mere showing that apparently similar stone from other deposits is not marketable. In other words, the existence of a unique value-bestowing property is not to be inferred solely from circumstances which could, but do not necessarily, result from the fact that a particular substance possesses such a property, but it must be affirmatively shown that the material the commonness of which is at issue differs in a demonstrable way from similar substances of common occurrence.

The only evidence affording a comparison of the material from the Granite No. 1 claim with other materials was the testimony of the Government's witness that the material from other deposits of gabbro was almost indistinguishable in its physical appearance from

that found on the Granite No. 1 claim. Appellant frankly admitted that he didn't know what difference there is between the gabbro on his claim and that found in other deposits. Larison, as we have noted, stated that the physical characteristics which seemed to make the material from appellant's claim attractive to its users were "the hardness and the sharpness and low silica" (II Tr. 38). No evidence was offered to show that the material from the claim differs in any of these attributes from that found in the other deposits reported.

It is true that appellant said that material taken from the other gabbro deposits was turned down by his customers (II Tr. 9). He did not say, however, for what uses the material was submitted. As has been noted, the stone from his claim proved to be unsatisfactory for use as a polished natural building stone or as tombstones because of its undesirable weathering characteristic (II Tr. 7, 13, 18) and for the same reason it was unsatisfactory for use in making exposed aggregate building panels (II Tr. 29, 33). There was no testimony that the material in the other deposits was rejected by customers for the uses in ground or crushed form to which material from the claim is put.

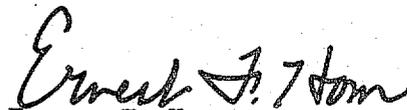
In short, the record is void of evidence that this material, composed of commonly-occurring rock-forming substances, derives a special economic value from any characteristic which distinguishes it from other materials which, for want of any recognized special value, must be regarded as common varieties of stone.

But the want of comparison does not end with the failure to show any unique property which would distinguish the material on appellant's claim from that found in other gabbro deposits. The question here is not whether this is a common variety of gabbro, but it is whether the material on the claim is a common variety of stone. Even if it were shown that the Granite No. 1 gabbro possesses special properties which distinguish it from other gabbro, we should have to conclude that it is, nonetheless, a common variety of stone if it appeared that it is used for the same purposes as, and that it has no greater market value than, other types of stone which are common varieties. Of at least equal import, then, with appellant's failure to show in what respect the Granite No. 1 stone is superior to similar materials which have not been used for the purposes for which it is allegedly valuable is his failure to provide any basis for comparison of the Granite No. 1 stone with other materials which are, or have been, used for those purposes.

What is the material used for? In those industries in which appellant's gabbro has been used, what materials were previously used for the same purposes? If the materials previously used for the same purposes were common varieties of stone, in what respect is appellant's gabbro superior to them, and to what extent is this superiority reflected in the price which it commands in the market? These questions, the answers to which could have been furnished only by appellant or by witnesses whose testimony could have been obtained by appellant, have been left wholly unanswered. In the absence of answers, there is no basis for finding that the material found on the Granite No. 1 claim is anything other than a common variety of stone.

The evidence submitted on behalf of the Government was, as the hearing examiner found, adequate to constitute a prima facie showing that the material found on the Granite No. 1 claim is a common variety of stone. It was, therefore, incumbent upon appellant, in order to prevail in this proceeding, to demonstrate by a preponderance of the evidence that he had discovered a deposit of an uncommon variety of stone. Foster v. Seaton, supra; United States v. Kelly Shannon et al., 70 I.D. 136 (1963). Such evidence was not forthcoming. Accordingly, the Granite No. 1 mining claim was properly declared null and void as having been located after July 23, 1955, for a common variety of stone.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed for the reasons stated herein.



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Land Appeals